Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

MARK G. LEVITOFF, et al.,

Petitioners.

v.

DAN GLICKMAN, Secretary, United States Department of Agriculture

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioners filed the complaint that is the subject of this petition, on October 13, 1992. Petitioners alleged that they suffered discrimination from actions of the Respondent Secretary of Agriculture, that were prohibited by Title VII of the Civil Rights Act of 1964. Petitioners alleged that the Respondent Secretary may assert that some of the employment decisions complained of were required by a consent decree in *Bernardi v. Yuetter*, Civ. No. C-73-1110-SC (N.D. Calif.). Petitioners further alleged they were not barred from presenting such claims on the basis that the exceptions to sub-section (n) of §703 of the Civil Rights Act Amendments of 1991 permited prosecution of Petitioners' complaint; not all actions of the Respondent complained of were required to be taken under the just-mentioned litigation, and that Petitioners' complained of continuing discrimination after such litigation was terminated. The District Court dismissed the complaint, without leave to amend, on the basis that Petitioner's claims were foreclosed under *GTE Sylvania v. Consumers Union*, 445 U.S. 375 (1980). The dismissal was upheld by the Court of Appeals.

The questions presented for review are:

1. Whether the principles enunciated in *Martin v. Wilks*, 490 U.S. 755 (1989) barred the District Court from dismissing Petitioners' complaint under the standards of *GTE Sylvania v. Consumers Union*, 445 U.S. 375 (1980).

2. Whether the existence of a court decree compelling an employer to make employment decisions standing alone is a complete defense to a complaint alleging violations of Title VII of the Civil Rights Act of 1964, as amended when the employer may admit the actions complained of violated Title VII and may admit that the actions taken were not required by a court order.

PARTIES TO THE PROCEEDING

Petitioners:

MARK G. LEVITOFF
ALEX B. COLE
KERMIT JOHANNSON
BAXTER VIRTUE
THOMAS MARKS
JOHN D. CROSSLIN
THOMAS CAVES,
and all those similarly situated

Respondent:

DAN GLICKMAN,
Secretary, United States
Department of Agriculture

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I. CITATIONS OF THE UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS

The following are the unofficial reports of the opinions and orders entered in the case by courts.

1. ORDER, entered on December 14, 1993 by the United States District District Court for the Northern District of California dismissing the complaint in its entirety, entering judgment in favor of defendant, and directing that the file be closed. (App. 2.)

2. MEMORANDUM entered on January 16, 1996 by the United States Court of Appeals for the Ninth Circuit affirming in part and reversing in part the District Court's December 14, 1993 order. (App. 11.)

3. ORDER entered on April 16, 1996 by the United States Court of Appeals for the Ninth Circuit denying petition for rehearing and rejecting the suggestion for rehearing en banc. (App. 19.)

II. STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The judgment of the Appeals Court sought to be reviewed herein was entered on January 16, 1996. (App. 11.) An order denying a petition for rehearing and rejecting a suggestion for rehearing en banc was entered on April 16, 1996. (App. 19.)

Jurisdiction of this Court to review the judgment herein on a writ of certiorari is asserted pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE.

Constitutional provisions and statutes involved in this case are:

Fifth Amendment to the Constitution of the United States:

"No person shall be ... deprived of life, liberty, or property, without due process of law ..."

Title 42 of the United States Code:[1]

Sec. 2000e-2(a)
Sec. 2000e-2(n)
Sec. 2000e-5(f)
Sec. 2000e-16(a)
Sec. 2000e-16(d)

IV. STATEMENT OF THE CASE

On October 13, 1992, Petitioners filed their complaint in the United States District Court for the Northern District of California. (App. 53.) Jurisdiction for the complaint was asserted pursuant to section 706(f)(3) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-5(f)(3), and 28 U.S.C. §§1331 and 1343. (App. 54, ¶1.) The complaint included class action allegations under Rule 23(a) F.R.Civ.P.

> ... for and on behalf of all males who applied for promotions, employment, and training within the time period allowed by law, and for

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[1] Because of the length of the statutes, the pertinent text is set out in the appendix as permitted in Rule 14(f) of this court.

> and on behalf of all qualified males in the work force who, because of Defendant's practice of discrimination, would have applied for such promotions, employment, and training during that same time period had it not been for their knowledge of the discrimination practiced by Defendant within the Pacific Southwest Region of the Forest Service, United States Department of Agriculture.

(App. 54, ¶ 3.)

The allegations of the complaint acknowledged Petitioners were challenging "... employment practices that may be asserted by defendant to have been required by a consent decree ...." (App. 54, ¶ 3.) The complaint further alleged such claims could be prosecuted pursuant to the subsection (n) of §703 of the Civil Rights Act. It was also alleged that the claims could be prosecuted for employment discrimination involving actions taken that were not required by court order, and for discrimination occurring after the term of a consent decree had expired. (App. 54, ¶ 3.)

On December 14, 1993 the District Court dismissed the complaint on two grounds. (App. 2.) First, the District Court accepted the Respondent Secretary's argument that he was required to comply with the terms of a consent decree and therefore the complaint must be dismissed under the doctrine of *GTE Sylvania v. Consumers Union*, 445 U.S. 375 (1980). (App. 8.) Second, the District Court finding lack of standing, dismissed Petitioners' claims alleging that some employment practices were not required by the consent decree citing *Vogel v. The City of Cincinnati*, 959 F.2d 594, 598 (6th Cir. 1992)), *cert. denied*, 113 S.Ct. 86 (1992). (App. 9.)

The District Court dismissed Petitioners' complaint

in its entirety, entered judgment in favor of defendant, and directed that the file be closed. (App. 2.) The order was therefore final and appealable to the Court of Appeals pursuant to 28 U.S.C. § 1291.

On January 16, 1996, the Ninth Circuit Court of Appeals issued its Memorandum opinion affirming the District Court's dismissal in part and reversing in part. The Court of Appeals affirmed the dismissal of the complaint on the basis *GTE Sylvania v. Consumers Union, supra.* The Court of Appeals reversed the District Court dismissal of the complaint for lack of standing. (App. 12.) Circuit Judge Kleinfeld dissented and would have reversed the dismissal. (App. 16.)

Petitioners herein, petitioned the Court of Appeals for a rehearing and suggested the rehearing be en banc. On April 16, 1996 the Court of Appeals denied the petition for rehearing and rejected the suggestion for rehearing en banc. (App. 19.)

V. THIS COURT SHOULD GRANT THE PETITION FOR REVIEW OF CERTIORARI

It is submitted that this petition for writ of certiorari should be granted for three reasons. They are:

1. The Court of Appeals for the Ninth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court.

2. The Court of Appeals for the Ninth Circuit has entered a decision in conflict with the decision of The Court of Appeals for the Eighth Circuit on the same important matter.

3. The Court of Appeals for the Ninth Circuit has sanctioned a departure from the accepted and usual course of judicial proceedings, by a lower court, as to call for an exercise of this Court's supervisory power.

A. Summary of Facts

As noted by the District Court directly implicated in this appeal is a case initiated in 1973. (*Bernardi v. Yuetter*, Civ. Action No. 73-1110 (N.D. Cal.)[2] (App. 2-4.) The *Bernardi action* alleged gender discrimination by the Respondent Secretary against female Forest Service employees. (App. 2-3.) The parties to the *Bernardi action* agreed to terms of settlement in 1979 and in 1981 the court granted final approval of a consent decree. In 1988, the District Court extended the consent decree for three more years ending in 1991. (App. 12.) In 1990, Petitioners attempted to intervene in the *Bernardi action.* The District Court denied the motion to intervene. An appeal was taken and the denial was upheld by the Court of Appeals in an unpublished decision. *Bernardi v. Yuetter*, 945 F.2d 408 (9th Cir. 1991) (App. 11.)

Petitioners continued to pursue remedies for employment discrimination. On October 13, 1992, Petitioners filed their complaint in the United States District Court for the Northern District of California, alleging employment discrimination prohibited by Title VII of the Civil Rights Act of 1964, as amended. The complaint was initiated as a class action on behalf of male employees who had suffered from discrimination favoring females. (App. 2-4.)

The complaint openly acknowledged that Petitioners

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[2] Hereafter this case will be referred to the "*Bernardi action*".

were challenging employment practices for which the Respondent Secretary may assert he was required to take by *Bernardi action* consent decree. (App. 54, ¶ 2.) The complaint contended the claims could be prosecuted for three other reasons. To guard against the effect that Section 108[3] of the Civil Rights Act Amendments of 1991 might be applied retroactively to Petitioners' claims, it was alleged that Petitioners' claims could be prosecuted pursuant to the exceptions of Section 108. Petitioners also alleged that unlawful employment practices complained of were not required to be taken by order of any court. Finally, Petitioners alleged that they suffered discrimination after the *Bernardi action* consent decree had been terminated. (App. 54, ¶ 2.)

Upon motion of the Respondent Secretary, on December 14, 1993 the District Court dismissed the complaint on two grounds. (App. 7-8.) First, the District Court accepted the Respondent Secretary's argument that he was required to comply with the terms of a consent decree and therefore the complaint must be dismissed under the doctrine of *GTE Sylvania v. Consumers Union*, 445 U.S. 375 (1980). The District Court characterized Petitioners' claims as a collateral attack on the *Bernardi action* consent decree. (App. 6.) The District Court rejected Petitioners' argument that *Martin v. Wilks, supra,* permitted them to prosecute their claims because their claims of discrimination were not adjudicated in the *Bernardi action.*

The District Court agreed with the Respondent Secretary that Section 108 of the Civil Rights Act of 1991[4] effectively overruled *Martin v. Wilks* and determined that

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[3] Codified at 42 U.S.C. 2000e-2(n).

[4] Public Law 102-166, November 21, 1991, 105 Stat. 1071.

Section 108 eliminated any tension that existed between *GTE Sylvania v. Consumers Union* and *Martin v. Wilks*. (App. 8.) Petitioners were not given any opportunity to establish that their claims could be prosecuted pursuant to the exceptions stated in Section 108.

The District Court, relying on *Vogel v. The City of Cincinnati, supra*, on the basis of lack of standing also dismissed Petitioner's claims based on allegations that some of the complained of acts were not required by the consent decree. (App. 9.) The District Court also determined that these allegations should be dismissed because Petitioners failed to identify the specific actions which constituted discrimination. (App. 9.) Petitioners were not given any opportunity to amend the complaint. However, while the Respondent Secretary's motion to dismiss the complaint was under consideration, Petitioners submitted to the District Court an additional citation of an administrative decision[5] issued by the Respondent Secretary and provided a copy thereof to the District Court. (App. 33.) The District Court was informed of the purpose of the submission as follows:

> This decision relates to defendant Secretary's previous contention that plaintiffs lack standing to prosecute claims of employment discrimination for actions taken by the Secretary that were not required by the Bernardi Litigation consent decree. The defendant Secretary had relied on Vogel v. The City of Cincinnati, 959 F.2d 594 (6th Cir. 1992), cert. denied, 113 S.Ct 86 (1992).
>
> Plaintiffs allege in paragraph 2 of their

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[5] *Hugh M. Shaver and Michael C. Leveroos v. Secretary of Agriculture*, Consolidated Complaint No. 910607, September 17, 1993.

> complaint that "... not all actions of the defendant that are complained of by plaintiffs were required to be taken under the ...." Bernardi Litigation Consent Decree. As stated in plaintiff's opposition to the defendant Secretary's motion to dismiss, the allegation was included so that plaintiffs could prosecute their claims of employment discrimination should they otherwise be denied an opportunity to collaterally attack the consent decree.
>
> The subject decision is relevant to the pending motion to dismiss in that it sets out, at least in part, the Secretary's own interpretation of the limits of the Bernardi consent decree. Accordingly, the decision is relevant to the question of whether plaintiffs may prosecute claims of employment discrimination for decisions admitted by the Secretary to not have been required by court order and which may be violative of the Title VII of the Civil Rights Act of 1964, as amended.

(App. 34.)

In the *Shaver/Leverroos* case, the Respondent Secretary, acting through his designated agent, determined that Agency officials had misapplied and erroneously interpreted the *Bernardi action* consent decree by, in effect, making gender the sole criteria for the selection therein. (App. 42-44.)

After an appeal was taken, the Ninth Circuit Court of Appeals issued its January 16, 1996 Memorandum opinion affirming the District Court's dismissal in part and reversing

it in part.[6] The Court of Appeals affirmed the dismissal of the complaint holding that *GTE Sylvania v. Consumers Union, supra,* completely foreclosed Petitioners' claims. (App. 13.) The Memorandum Opinion majority does not address the question of whether the Respondent Secretary had in fact defended, or would defend, any specific employment practice based on reliance of the requirements of the *Bernardi action* consent decree.

The Court of Appeals reversed the District Court dismissal of the complaint for lack of standing. The Appeals Court majority agreed with the District Court that Petitioners' complaint did not allege facts stating the Respondent Secretary made employment decisions not required by the Secretary. App. 14.)

Petitioners submitted a copy of the above-mentioned *Shaver/Leveroos* administrative decision with their opening brief in the Appeals Court. Petitioners' also submitted a copy another administrative decision issued by the Respondent Secretary in an employment discrimination complaint involving the *Bernardi action* consent decree. *Barry W. Callenberger v. Secretary of the Agriculture*, decision issued on August 20, 1993. (App. 26.) In *Callenberger*, the Respondent Secretary determined that the record showed that the selecting official for the position involved therein prior to making his selection determined that the male complainant was the best qualified for the position and that the male complainant was not selected solely because of the *Bernardi action* consent decree. The Respondent Secretary rejected an interpretation of the *Bernardi action* consent decree that would permit the selection of females over better qualified males when gender is the main factor for selection. (App. 30.)

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[6] Circuit Judge Kleinfeld dissented and would have reversed the dismissal. (App. 16.)

The Court of Appeals was requested to take judicial notice of both administrative decisions pursuant to Fed. R. Evid. 201 (b)(2). The request for judicial notice was rejected for the reason that prosecution of Petitioners' claims was otherwise foreclosed and that the administrative decision did not demonstrate "... any routine practice or commonplace pattern." (App. 13-14, n. 1.)

Both the District Court and the Appeals Court declined to base their judgments on Section 108 of the Civil Rights Act Amendments of 1991. (App. 4-5, n. 2 and 15, n. 2.)

B. The Court of Appeals for the Ninth Circuit Has Decided an Important Federal Question in a Way That Conflicts with Relevant Decisions of this Court.

Prior to the this court's decision in *Martin v. Wilks*, most of the Circuit Courts of Appeal would not permit complainants to prosecute claims of employment discrimination when the prosecution of the claims challenged the provisions of consent decrees even when the complainants were not parties to the prior litigation. *Martin v. Wilks, supra*, 490 U.S. at 759, n. 3. Complaints challenging actions taken by employers in accordance with a consent decree in which the plaintiff was not a party were often characterized as an "impermissible collateral attack". *See, Dennison v. City of Los Angeles*, 658 F.2d 694, 696 (9th Cir. 1981). *Martin v. Wilks*, brought an end to the foreclosure of such claims. Therein, this court held: "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." (Footnote omitted.) 490 U.S. at 762.

Rather than follow *Martin v. Wilks*, the District Court dismissed the complaint under principles stated by this Court

in *GTE Sylvania v. Consumers Union.* (App. 8.) The Court of Appeals judgment affirmed the dismissal of the District Court for the same reason. (App. 8.)

GTE Sylvania was decided nine years prior to *Martin v. Wilks. GTE Sylvania* did not involve a claim of employment discrimination. Some time after March of 1974, Consumers Union and Public Citizen's Health Research Group (Requesters) sought disclosure of documents from the Consumer Product Safety Commission (CPSC) under the Freedom of Information Act. CPSC announced in March of 1975 that it would release information that it had collected from petitioner television manufacturers. Petitioners in *GTE Sylvania* filed in four federal district courts seeking to enjoin release of the documents under FOIA. All actions were consolidated in the Delaware District court. The Requesters were not joined in the federal actions nor did they seek intervention therein. Rather, they filed the underlying *GTE Sylvania* case in the District of Columbia District Court in May of 1975. The CPSC and the petitioners were joined therein. In October of 1975, pending trial the Delaware Court preliminarily enjoined release of the FOIA requested documents. The District of Columbia District Court dismissed the case before it on the basis that an Article III case did not exist because CPSC had agreed to release of the documents when not enjoined from doing so and that no claim was stated since the Agency no longer had the documents. In addition, compulsory joinder of the petitioner/manufacturers was denied for lack of federal jurisdiction. The District of Columbia Appeals Court reversed "... conclud[ing] that there was a case or controversy between the plaintiffs and the CPSC on the " `threshold question of the scope and effect of the proceedings in Delaware.' " *GTE Sylvania v. Consumers Union, supra,* 445 U.S. 379. Subsequently, the Delaware District Court entered summary judgment in favor of the manufacturers and permanently enjoined release of the requested FOIA data. Upon grant of certiorari, this Court

then vacated the District of Columbia Appeals Court judgment and remanded the matter for consideration in light of the Delaware permanent injunction. The District of Columbia Appeals Court reaffirmed its holding for various reasons and remanded the case to the District of Columbia District Court for a decision on the merits as to whether the items requested must be released by the CPSC. The Supreme Court granted the manufacturers petition for certiorari and again reversed the District of Columbia Appeals Court decision. However, this Court held that the District of Columbia district court case did present an Article III case or controversy. The case and controversy presented was the effect of the Delaware injunction on the requesters. *Supra* 445 U.S. 382-83.

The issue presented to the Supreme Court in *GTE Sylvania* was whether a federal agency can be ordered to perform and act that was in direct conflict with an order of another federal court. The orders of the Delaware District Court totally precluded the CPSC from exercising any discretion regarding the release of specifically identified documents. The CPSC did not make a decision to withhold the requested documents and it could not be charged, under FOIA, with improperly or wrongfully withholding the requested documents because it was not permitted to do so by another court. *Supra*, 445 U.S. 386. The CPSC was required to obey the Delaware injunction even if it otherwise had "... proper grounds to object to the order." *Id.*

One commentator has characterized the *GTE Sylvania* Court as interpreting the Freedom of Information Act in way that rendered the requester's complaint to be moot.[7] The

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[7] See, Marjorie E. Silver, *Fairness and Finality: Third-party Challenges to Employment Discrimination Consent Decrees after the 1991 Civil Rights Act*, 1993 (continued...)

District Court and the Appeals Court erroneously concluded that *GTE Sylvania* stands for the principle that a compliance with a consent judgment is a complete defense to claims of employment discrimination and as such bars all and any relief to parties injured by someone else's consent decree.

As noted above, this Court explicitly ruled otherwise in the context of claims brought under the Civil Rights Act of 1964. *Martin v. Wilks, supra,* 490 U.S. 762. In *Martin v. Wilks* a consent decree was entered into between the original plaintiffs and defendants in an employment discrimination complaint brought by African Americans challenging the hiring practices of the Birmingham Fire Department. Later, some white fire fighters, alleging harm from implementation of the decree, filed independent claims of unlawful discrimination. The filing of the independent claims raised the issue of whether it was an "impermissible collateral attack" on the previously entered consent decree. The District Court eventually dismissed the white fire fighters complaint on the basis defendant could not be guilty of unlawful racial discrimination when the actions were required by the terms of a consent decree. The Eleventh Circuit reversed the decision of District Court (*In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987) and the Appeals Court decision was upheld by this Court.

> A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly 'settle' voluntarily or otherwise, the conflicting claims of another group of employees who did not join in the agreement"

Martin v. Wilks, supra, at p. 762.

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[7](...continued)
Fordham L. Rev. 321, 324.

Petitioners are in the same situation as the Complainants in *Martin v. Wilks*. The Respondent Secretary entered into an agreement with a class of female employees for settlement of employment discrimination claims in the *Bernardi action*. Petitioners, who are male, were not parties to the *Bernardi action* and at no time did they join in the agreement made by the Respondent Secretary and the female class.

GTE Sylvania reiterates the general rule that parties subject to orders of a court, must obey such orders even if there is proper grounds for objection unless prior relief from the order is obtained. It does not stand for the principle that parties injured by compliance with a prior order of a court may not obtain relief that does not require violation of the prior order.

Martin v. Wilks, decided after *GTE Sylvania*, establishes that compliance with a consent decree does not provide a complete defense to Title VII claims. In *Martin v. Wilks*, the Court of Appeals for the Eleventh Circuit's view[8] regarding the preclusive effect of the consent decree in which the *Wilks* plaintiffs' had not been parties. "We agree with the view of the Court of Appeals, however, that the proceedings in the District Court may have been affected by the mistaken view that the respondents' claims on the merits were barred to the extent that they were inconsistent with the consent decree." *Martin v. Wilks, supra*, 490 U.S. at 769. This statement makes it clear that the general principles of *GTE Sylvania* cannot bar Petitioners' claims.

In the *Birmingham* litigation, the Eleventh Circuit held that a consent decree, as a voluntary undertaking, is accorded no more weight than an affirmative action plan. It

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[8] *In re Birmingham Reverse Discrimination Employment Litigation, supra*, 833 F.2d 1492.

remanded the plaintiffs' claims to the district court for trial on the merits of plaintiffs' Title VII claims. On remand, the district court was directed to determine whether the challenged employment decisions met the standards set out in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). *Birmingham* 833 F.2d at 1500-1502. The *Birmingham* Court "reject[ed] any notion that the memorialization of that voluntary undertaking in the form of a consent decree somehow provides the employer with extra protection against the charges of illegal discrimination." 833 F.2d at 1501.

After this Court's issuance of its decision in *Martin v. Wilks*, to the extent that compliance with a consent decree could be asserted as a complete defense for third-party claims under the doctrine of the doctrine *GTE Sylvania*, such a defense is no longer available.

As noted by the District court (App. 8) and the Court of Appeals (App. 15, n. 2.) Congress responded to the *Martin v. Wilks* case, as well as other Supreme Court cases involving Title VII.[9] Section 108 of the Civil Rights Act of 1991 was intended to overturn *Martin v. Wilks* and to provide an alternative remedial scheme.[10] The broad effect of *Martin v. Wilks* was understood by Congress and consequently Congress responded to in the Civil Rights Act of 1991 and overruled *Martin v. Wilks* in some aspects. *Maitland v. University of Minnesota*, 43 F.3d 360, 362 (8th Cir. 1994). It makes no sense for Congress to have responded to *Martin*

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[9] *See,* Section 108 of the Civil Rights Act of 1991, Pub.L. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. §2000e-2(n)).

[10] H.R. Rep. No. 40(I), 102 Cong., 1st Sess. 60 (1991) *reprinted* in 1991 U.S.C.C.A.N. 549, 592-593; H.R. Rep. No. 40(II), 102 Cong., 1st Sess. 60 (1991) *reprinted* in 1991 U.S.C.C.A.N. 549, 712.

v. Wilks in the manner it did if such claims were already precluded by the doctrine enunciated in *GTE Sylvania* which preceded *Martin v. Wilks*. *GTE Sylvania* can not be considered an absolute bar to challenges to consent decrees. To deem it otherwise it would have to be concluded that Congress acted foolishly in enacting remedial legislation to change the effect of *Martin v. Wilks*.

The District Court ignored the fact that Congress in responding to *Martin v. Wilks* did not entirely reject or overrule its effect, but instead chose to implement a remedial scheme as suggested by this Court.[11] The Appeals Court appears not to have considered application of Section 108 because of its judgment that *GTE Sylvania* barred prosecution of any of Petitioners' claims.[12] To the extent that Section 108 is applicable to Petitioners claims, Petitioners had the right to prove that the exceptions to Section 108 permitted prosecution of their claims.

The judgment of the Ninth Circuit Court of Appeals barring prosecution of Petitioner's claims under *GTE Sylvania v. Consumers Union*, conflicts with the important federal question presented in *Martin v. Wilks* to the degree and importance justifying the granting of the petition for certiorari.

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[11] *Martin v. Wilks, supra*, 490 U.S. *, n. 2.

[12] In footnote 2 of the January 16, 1996 Memorandum Opinion, the majority chose not to address the question of retroactivity of Section 108, but suggested that Section 108 permits challenges to practices "... that go beyond the scope of a previously litigated consent decree." (App. 15, n. 2.) Petitioners' claims arose before and after passage of the Civil Rights Act of 1991.

C. The Court of Appeals for the Ninth Circuit Has Entered a Decision in Conflict with the Decision of the Court of Appeals for the Eighth Circuit on the Same Important Matter.

The Ninth Circuit Appeals Court majority opinion conflicts with an Eighth Circuit Court of Appeals opinion that permitted a plaintiff to proceed with a Title VII complaint against his employer. *Maitland v. University of Minnesota*, supra, 43 F.3d 360 (8th Cir. 1994).

The gravamen of plaintiff Maitland's case was that he was discriminated against on the basis of gender when pay increases were given to female academic employees pursuant to the terms of a consent decree. Plaintiff, as a male was not eligible for the pay increase given to females. *Maitland v. University of Minnesota, supra*, 43 F.3d 360. The consent decree challenged in *Maitland* had its genesis in a 1980 settlement of a 1973 class action sex discrimination complaint filed by female academic employees of the University of Minnesota. Subsequent litigation initiated in 1983 by female academic employees against the University resulted in settlement and the creation of a second consent decree through settlement achieved in 1989. Maitland was not a party to the female class litigation but was permitted to object to the settlement of the second litigation. After salary increases were granted to females under the consent decree, Maitland, in July 1990, initiated a complaint with the Equal Employment Opportunity Commission (EEOC). Upon receiving a right-to-sue notice, Maitland filed his complaint in the District Court on January 11, 1993. *Id.*

The primary issue in *Maitland* was whether the District Court was correct in dismissing Maitland's complaint pursuant to the Civil Rights Act of 1991 or general principles of estoppel. The *Maitland* Court first analyzed and discussed

the applicability of Section 108 of the Civil Rights Act of 1991.[13] The *Maitland* Court held that Maitland's Title VII claims were not barred unless Section 108 applied to claims arising before its enactment. *Supra*, 43 F.3d 360. After analyzing Section 108, its legislative history, and case law, the Court held that Section 108 does not govern claims arising before Section 108's enactment, and therefore Maitland's claims were not barred by the Civil Rights Act of 1991. *Supra*, 43 F.3d 361-63.

The *Maitland* Court then addressed the question of whether general principles of estoppel precluded prosecution of Maitland's claims and found that they did not. *Supra*, 43 F.3d 363-64. Accordingly, the Court found it unnecessary to address Maitland's due process claim.[14] *Supra*, 43 F.3d 364.

The direct conflict between the Ninth Circuit Appeals Court majority and the Eighth Circuit's decision is apparent in a closing comment in the *Maitland* opinion.

> Moreover, the Supreme Court in *Martin v. Wilks* squarely held that a voluntary settlement cannot cut off the conflicting claims of persons who do not join in the settlement. Under *Martin*, which was the law of the land at the time of the operative events in the present

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[13] 42 U.S.C. § 2000e-2(n). Having disposed of the appeal on other grounds, the Memorandum Opinion majority declined to "... address the thorny issue of retroactivity of Section 108 ....". (App. 15, n. 2.)

[14] Alternatively, Maitland may have contended that the 42 U.S.C. § 2000e-2(n)(2)(D) permitted him to challenge a consent decree on the basis of denial of due process of law required by the Constitution should it have been affirmed that Section 108 applied to his complaint.

> case, Maitland had the right to challenge actions taken pursuant to the consent decree in a separate action regardless of any notice of or opportunity to participate in the proceeding that led to judicial approval of the settlement. *See supra* at 361-63; *Martin*, 490 U.S. at 768, 109 S.Ct. at 2187-88. We therefore cannot agree that the 'settled expectations of the parties' to the consent decree will be disrupted by the litigation of Maitland's claims.

Thus, if the Petitioners were able to pursue its claims in a district court within the Eighth Circuit, its claims could be prosecuted on the basis of *Martin v. Wilks*, *supra*, while in the Ninth Circuit Court of Appeals the same claim is barred under *GTE Sylvania v. Consumers Union*, *supra*. Petitioners claims could also be prosecuted in the Sixth and Eleventh Circuits. *See, Vogel v. The City of Cincinnati*, *supra*, 959 F.2d 594; *Birmingham Reverse Discrimination Employment Litigation*, supra, 833 F.2d 1492.

The question of the interrelationship and controlling principles of *GTE Sylvania*, *Martin v. Wilks*, and Section 108 of the Civil rights Act of 1991 involve a rule of national application in which there is an overriding need for national uniformity. Title VII complaints similar to those of the Petitioners, and of the plaintiff in *Maitland*, necessarily arise throughout the nation because of the broad effect of Title VII. Most employees are covered by the Title VII, and the volume of Title VII claims that are litigated is great as evidenced by the reported cases alone. Title VII requires equal treatment for all employees. Accordingly, a national standard is required for all plaintiffs in the same situation as the Petitioners, and those like the *Maitland* plaintiff, or there is no equal treatment. On this basis, and the existence of a conflict between Circuit Courts of Appeal, the petition for certiorari should be granted.

D. The Court of Appeals for the Ninth Circuit Has Sanctioned a Departure from the Accepted and Usual Course of Judicial Proceedings, by a Lower Court, as to Call for an Exercise of this Court's Supervisory Power.

The Court of Appeals majority Memorandum Opinion fails to follow the accepted and usual course of judicial proceedings by (1) ignoring facts that were pled in Petitioners' complaint; (2) denying Petitioners the opportunity to amend the complaint to correct asserted failures to plead sufficient facts; (3) denying Petitioners the opportunity prove they could meet the exception of Section 108, if applicable; and (4) not requiring the Respondent Secretary to prove an affirmative defense.

1. The Appeals Court majority ignored facts pled in Petitioners' complaint; and denied Petitioners an opportunity to amend the complaint to correct asserted failure to plead sufficient facts.

The Appeals Court majority states that the "... complaint fails to allege any facts that fall outside the actions mandated by the *Bernardi action* consent decree."[15] (App. 13.) This is incorrect. Paragraph 2 of the Petitioners complaint alleges:

> Plaintiffs' claims involves a challenge to employment practices that may be asserted by

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[15] The complaint involved a challenge to employment practices that might have been asserted by the Secretary to have been required by a consent decree in *Bernardi v. Yuetter*, Civ. No. C-73-1110-SC(N.D. Calif.)

> defendant to have been required by a consent decree in *Bernardi v. Yuetter*, Civ No. C-73-1110-SC (N.D. Calif.). Plaintiffs allege that they are not barred from presenting such claims on the basis that the exceptions to subsection (n) of §703 of the Civil Rights Act of 1964 permits the prosecution of plaintiffs claims, *not all actions of the defendant that are complained of by plaintiffs were required to be taken under the just-mentioned litigation, and plaintiffs complain of continu-ing discrimination after such litigation was terminated.* (Emphasis added.)

(App. 54, ¶ 2.)[16]

This allegation was sufficient to state a claim for violation of the Petitioners' rights under Title VII of the Civil Rights Act of 1964, as amended, and as discussed below permits prosecution of their claim notwithstanding *GTE Sylvania v. Consumers Union, supra.* Moreover, as is also discussed below, to the extent the allegations are deemed insufficient, leave to amend the complaint should have been given.

The Apperals Court majority also states: "... none of the facts pled by Appellants here indicate that the government did anything except follow the consent decree." (App. 15.) There is a great indication, and perhaps conclusive demonstration, in the Respondent Secretary's own administrative decisions in Title VII cases that the *Bernardi action* consent decree was not followed, and departures from the

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[16] Paragraph 6 of the complaint incorporates by reference the allegations of paragraph 2 for the Title VII cause of action. (App. 56-57.)

decree violated employment discrimination laws. The first administrative decision is *Hugh M. Shaver and Michael C. Leveroos v. Secretary of Agriculture, supra.* (App. 37.) A copy of this administrative decision was submitted to the District Court as a supplement to a previously filed opposition brief. The second decision *Barry W. Callenberger v. Secretary of the Agriculture, supra,* (App. 26) was not submitted to the District Court because the matter was under submission and further briefing had not been invited in response to the prior supplementation. As mentioned above, the Court of Appeals majority denied Appellant's request to take judicial notice of the two administrative decisions because of its determination that *GTE Sylvania* foreclosed litigation of the precise issue that the Petitioners raised. (App. 13.) The Court added: "Further both decisions only address specific individual instances of discrimination. Neither speak to nor demonstrate any routine practice or commonplace pattern." (App. 13-14, n. 1.) The basis for the Respondent Secretary's decision finding of discrimination in the *Shaver/Leveroos* complaint was the erroneous interpretation and application of the "... CD [*Bernardi action* consent decree], merit promotion principles, ... [and] logic." (App. 43.) In *Callenberger* the Respondent Secretary concluded: "No provision in the [*Bernardi action*] CD provides for the selection of anyone other than the best applicant based on merit." (App. 43.) This Secretarial determination and admission, must be juxtaposed with the actual allegations of the complaint.

> In paragraph 11, it is alleged that there was an,
>
> ... intentionally administered pattern or practice of considering the gender of the applicant for any vacant position, and either refusing to consider male applicants, preferring female applicants or demanding from male applicants qualities, credentials,

> and experience not required of female applicants. This consideration of gender has been applied to all male applicants who have sought positions or training with Defendant. Because of this discrimination the members of the class were victims of discrimination on the basis of their sex (male) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000e-et seq.

(App. 56-57.)

Petitioners in their complaint alleged a "routine practice" and "commonplace pattern" of the very type of employment discrimination found by the Respondent Secretary himself to be outside any order of any court and which violate the Title VII prohibitions against gender based discrimination.

Further, there is nothing in the record before the District Court or the Court of Appeals that supports a conclusion that any of the acts complained of by the Petitioners were required to be performed by the *Bernardi action* consent decree. Thus, there is no factual basis to support a conclusion on the basis of *GTE Sylvania,* if applicable, that the *Bernardi action* consent decree foreclosed prosecution of the discrimination alleged in Petitioners' complaint.

As discussed above, the Appeals Court majority is based, at least in part, on what was not alleged in the complaint. This is clearly contrary to the Federal Rules of Civil Procedure and clearly established law. Leave to amend a complaint "shall be freely given". Rule 15(a) F.R.Civ.P. A complaint can not be dismissed unless a plaintiff cannot prove a set of facts upon which relief could be granted. *Foman v. Davis,* 371 U.S. 178, 182; *United Union of Roofers*

v. Insurance Corp., 919 F.2d 1398, 1402 (9th Cir. 1990). Accordingly, if the problem was a lack of pleading essential allegations, granting leave to amend is appropriate rather than dismissal. The Petitioners were denied the opportunity to amend their complaint. If given this opportunity, the Petitioners can allege and prove routine and pervasive discrimination against male employees. Further, the Petitioners can allege and prove that such discriminatory actions in no way were required or permitted to be taken, or were otherwise sanctioned by the *Bernardi action* consent decree.

2. The Appeals Court majority denied Petitioners the opportunity prove they could meet the exceptions of Section 108, if applicable.

Even if Section 108 is given retroactive effect, Congress expressly set out the conditions upon which challenges to a consent decree could nonetheless be prosecuted. Petitioners are entitled to prosecute complaints if they can establish that they did not receive notice of the proposed consent decree sufficient to meet Constitutional requirements (42 U.S.C. § 2000e-2(n)(1)(B)(i)(I)); that they were not given a reasonable opportunity to present objections to the decree (42 U.S.C. § 2000e-2(n)(1)(B)(i)(II)); that they were not adequately represented by another party in the litigation when the consent decree was issued (42 U.S.C. § 2000e-2(n)(1)(B)(ii); that the decree was entered into through collusion and fraud by the government or was transparently invalid (42 U.S.C. § 2000e-2(n)(2)(C); and that the consent decree process denied plaintiffs due process of law under the Constitution(42 U.S.C. § 2000e-2(n)(3). Petitioners alleged that their claims were within these exceptions and they should have been given the opportunity to prove their claims.

3. The Appeals Court majority did not require the Respondent Secretary to prove an affirmative defense.

Rule 8(c) of the Federal Rules of Civil Procedure specifically identifies 19 affirmative defenses that must be alleged as defenses to a complaint. Added to the list, is a short but sweeping and broadly encompassing description of "... all matter constituting an avoidance or affirmative defense.". While defense based upon compliance with a court order is not specifically listed, it is obviously a defense of avoidance and its similarity to other listed affirmative defenses dictates a conclusion that reliance on a court order is an affirmative defense. Particularly analogous are the affirmative defenses of arbitration and award, discharge in bankruptcy, estoppel, illegality, and res judicata. The affirmative defense of illegality primarily precludes claims because of statutory prohibitions. The other just-mentioned affirmative defenses involve preclusion of claims on the basis of prior judicial or other types of proceedings. A variety of cases decided by the Ninth Circuit Court of Appeals establish that when claims are essentially sought to be precluded by confession and avoidance that such preclusion constitutes an affirmative defense. *Lam v. University of Hawai'i*, 40 F.3d 1551, 1564-65 (9th Cir. 1994) (Title VII case where burden on employer to prove decision would have been same without discrimination characterized as an affirmative defense required to be proven.); *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992) (Qualified immunity affirmative defense with burden on party asserting immunity to prove defense.); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 875 (9th Cir. 1982) (Exceptions to Equal Pay Act provisions affirmative defenses that must be pled and proven.); *Electric Smith Inc. v. Secretary of Labor*, 666 F.2d 1267, 1270 (9th Cir. 1982) (Reasonable and realistic compliance as alternative to literal compliance with safety regulations affirmative defense with burden on employer because the employer's conduct was

within its own knowledge.); and *Santos v. Alaska Bar Assn.*, 618 F.2d 575, 576-77 (9th Cir. 1980) (Immunity from suit, failure to exhaust administrative remedies, and res judicata defenses described as affirmative defenses.)

More importantly, the Memorandum Opinion majority, and the district court, failed to recognize that the burden of proving affirmative defenses rests with the party asserting the defense. *Lam v. University of Hawai'i, supra* 40 F.3d 1564-1565; *Houghton v. South, supra* 965 F.2d 1536; *Kouba v. Allstate In. Co., supra* 691 F.2d 875; and *Electric Smith Inc. v. Secretary of Labor, supra* 666 F.2d 1270.

Here the burden was not met nor even seriously attempted. The mere existence of an order and action taken by a party subject to the order and arguably related to the court order is not sufficient to find a party in contempt. A finding of contempt must be predicated on the existence of a specific and definite order. *Gifford v. Heckler*, 741 F.2d 263, 265 (9th Cir. 1984) Whether an order is specific is a question of fact decided in the context in which the order was entered. *U.S. v. Burstyn*, 878 F.2d 1322, 1324 (11th Cir. 1989) It makes no sense, and is patently unfair, for the Respondent Secretary to be permitted to defend against a motion to hold him in contempt by establishing that his actions were not proscribed by an order of a court, but then permit the Respondent Secretary to evade such examination when charged with actions that violate employment discrimination laws when it is alleged such discriminatory action is not required by any court order. A court can not presume that a court order required federal officials to violate employment discrimination laws. The fact that the *Bernardi action* consent decree existed, and was extensive, does not establish that the use of gender as a sole selection criteria was required by the decree or whether, as is alleged, the Respondent Secretary's management employees routinely and pervasively used gender as a sole selection criteria for

employment decisions, a practice that was not sanctioned or approved by any order of the District Court judge in the *Bernardi action.*

Even in a case where the affirmative defense of judicial immunity may preclude prosecution of a claim, the facts justifying the defense must be established. For the defense to apply, a court must determine whether a judicial official acted in the clear absence of jurisdiction. *Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974). The often repeated basis for judicial immunity, as expressed by Judge Learned Hand, is that the absence of such immunity, "'would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.'". *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). Nonetheless, the Ninth Court of Appeals has acknowledged the admonition of the Supreme Court that, "... the doctrine of immunity should not be applied broadly and indiscriminately, but should be invoked only to the extent necessary to effect its purpose. *Gregory v. Thompson, supra,* 500 F.2d 62. It is contrary to logic and policy to subject judges to closer scrutiny in the performance of their judicial duties than that of the Respondent Secretary. The *Gregory* Court added that a "[Court] also must look beyond the status of the party seeking immunity and consider the nature of the conduct for which immunity is sought." *Gregory v. Thompson, supra* 500 F.2d 63-64. Here, an inquiry is required beyond status, that is, the existence of an order. The nature of that order must be compared to the acts that have been alleged or could have been alleged by amendment to the complaint. To do otherwise, permits government employees to unflinchingly and irresponsibly flaunt the law rather than to faithfully perform their duties.[17]

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[17] Courts do not permit parties to raise impossibility defenses when the inability to perform was intentionally (continued...)

It is particularly distressful that the District Court and the Appeals Court departed from the accepted and usual course of judicial proceedings described in this section when the record demonstrates that if Petitioners are permitted to prosecute their complaint, the Respondent Secretary is likely to admit routine and pervasive discrimination that he has forthrightly admitted in employment discrimination complaints brought against him and which involve the *Bernardi action* consent decree. *See, Hugh M. Shaver and Michael C. Leveroos v. Secretary of Agriculture, supra.* (App. 37) and *Barry W. Callenberger v. Secretary of the Agriculture, supra.* (App. 26.)

VI. CONCLUSION

It is contended that the foregoing demonstrates that the petition for a writ of certiorari should be granted. The Appeals Court majority has decided an important federal question in a way that conflicts with this Court's decision in *Martin v. Wilks.* The decision of the Ninth Circuit Appeals Court majority is in conflict with at least three other circuit court of appeals. Finally, the Court of Appeals ignoring of well-pled facts, failure to permit amendment of the complaint, failure to permit Petitioners to show that they could prosecute their claims within a Congressional created remedial scheme, and failure to require the Respondent Sec-

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[17](...continued)
caused by the party's own wrongdoing. *United States v. Asay*, 614 F.2d 655, 660 (9th Cir. 1980) Pettioners would amend their complaint if permitted to allege that the consent decree was entered into through collusion and fraud by the government.

tary to prove affirmative defenses, justifies the exercise of this Court's supervisory power.

Respectfully submitted this 15th day of July, 1996.

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APPENDIX

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FILED
DEC 20 1993
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICTOF CALIFORNIA

MARK G. LEVITOFF, ALEX B. COLE, KERMIT JOHANNSON, BAXTER VIRTUE, THOMAS MARKS, JOHN D. CROSSLIN, THOMAS CAVES, and all those similarly situated,

Plaintiff,

v.

MIKE ESPY, Secretary, United States Department of Agriculture,

Defendant.

Case No. C 92-4108 BAC

ORDER

The named plaintiffs in this action represent a class of male employees of the Unites States Forest Service "("Forest Service"). Plaintiffs seek monetary and injunctive relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-16 et seq., challenging employment practices utilized by defendant, Secretary of the Department of Agriculture (the "Secretary"), under a Consent Decree ("Decree") approved by this court in *Bernardi v. Yeutter,* Civ. Action No. 73-1110 SC (N.D. Cal.) (*"Bernardi"*). The *Bernardi* Decree settled claims of gender

discrimination brought by a class of female Forest Service employees. Defendant has filed a motion to dismiss plaintiffs' complaint maintaining that *Bernardi* Decree acts as a bar to this action. Upon consideration of the briefs and declarations filed in support of and in opposition to defendant's motion, and good cause appearing therefrom, defendant's motion to dismiss id GRANTED.

I. FACTS AND BACKGROUND

The named plaintiff in the underlying *Bernardi* action was a female sociologist employed by the Pacific Southwest Forest and Range Experimentation Station ("PSW") of the Forest Service. In 1973 the *Bernardi* plaintiff brought a Title VII civil rights action on behalf of herself and other similarly situated employees of the Department of Agriculture, for wrongful and discriminatory denial of promotion opportunities. In August 1979, following extensive discovery and settlement negotiations, the parties agreed to settle the case under the terms of a consent decree. The court expressed concerns about the initial proposed Decree and instructed the parties to modify portions of the Decree. A modified Decree was submitted in October 1980.

The proposed Decree covered Region 5 of the Forest Service and PSW, an administrative component of the Forest Service headquartered in Berkeley, California. The longterm goal of the Decree was to "eliminate underrepresentation of women within each General Schedule job series represented within its work force and at each grade level therein." This goal was to be achieved "to the greatest extent possible" through an affirmative action plan to be implemented during the life of the Decree.

The Decree contemplated a multi-step process towards development of the affirmative action plan involving a Needs Assessment, formulation of Interim Goals, and a Written Plan

detailing specific actions, definitions, and performance standards for those responsible for achieving the goals. The Decree was to remain in effect for five years, i.e., until May 1, 1986, with the district court retaining jurisdiction for an additional six months. Compliance with the Decree was to be overseen by a Decree Monitor who, every six months, was required to provide the court and the parties with a report summarizing and evaluating the progress made towards accomplishing the goals of the Decree.

On February 19, 1981, the court tentatively approved the Consent Decree and scheduled a fairness hearing. A second fairness hearing was held on May 1, 1981. The court granted final approval to the Decree, which became effective on or about July 1, 1981, after expiration of the appeal period. On May 9, 1988, in response to a contempt motion brought by the *Bernardi* plaintiffs, Judge Conti extended the consent decree for an additional three years (i.e. , to May 8, 1991).

The Levitoff Plaintiffs' Challenge to the Bernardi Consent Decree

On February 28, 1990, almost two years after the decree was extended, and approximately one year before its term was scheduled to expire, the Levitoff plaintiffs filed a motion to intervene in *Bernardi* on behalf of a class of male Region 5 employees. The Levitoff plaintiffs also filed a motion for injunctive relief against the Secretary of Agriculture, requesting a suspension of the Decree.[1] The Levitoff

[1] The Secretary suggests that plaintiffs' claims may be barred by the doctrine of collateral estoppel as alternative grounds for dismissal. The Secretary argues that in denying the Levitoff plaintiffs' motion for injunctive relief, Judge Conti specifically addressed the merits of the plaintiffs' claim

(continued...)

Levitoff plaintiffs

asserted that they were suffering "great injury . . . as a result of the Consent Decree and its implementation by the Forest Service." In particular, the Levitoff plaintiffs claimed that the Forest Service was utilizing employment practices which "considered the gender of the applicant for any vacant position, and either refused to consider male applicants . . . or required credentials not required of female applicants." Proposed Complaint for Intervention ¶ 7. They maintained that such practices discouraged males from applying for various employment opportunities on the assumption that they would be rejected.

Judge Conti rejected plaintiffs' request for injunctive relief and denied their request to intervene as untimely. Judge Conti's order regarding intervention was upheld by the Ninth Circuit. See Bernardi v. Yeutter, 945 F.2d 408 (9th Cir. 1991). On April 13, 1993, Judge Conti issued an order approving a final settlement of the *Bernardi* action and suspending the Decree's injunctive relief and the Decree Monitor's duties.

Plaintiff' filed the current action on October 13, 1992, after the *Bernardi* litigation had concluded. Plaintiffs do not deny that the factual allegations underlying this action are

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[1](...continued)
that the decree was invalid and reaffirmed the validity of the decree. The court declines to address this grounds for dismissal. It is not clear from the record that plaintiffs' challenge to the decree was actually litigated. Judge Conti rejected plaintiffs' request to intervene as untimely. The Ninth Circuit , in upholding Judge Conti's ruling regarding intervention, did not address plaintiffs' claims for injunctive relief.

virtually identical to the Levitoff plaintiffs' unsuccessful complaint in intervention. Plaintiffs allege that they were qualified to perform various positions they sought, but that the Forest Service refused to hire, promote, provide training or other employment opportunities to them, while women were treated more favorably. Plaintiff assert that the Forest Service's actions were part of an "intentionally administered pattern or practice of considering the gender of the applicant for any position and either refusing to consider male applicants, preferring female applicants or demanding from male applicants qualities, credentials, and experience not required from female applicants.

II. DISCUSSION

A. Challenge to the consent Decree

Plaintiffs' complaint, which seeks relief for those male employees who allegedly were adversely affected by the *Bernardi* Decree's affirmative action plan, constitutes a challenge to the validity of the Decree because "implicit in the . . . prayer for relief is the contention that operation of the consent decree itself constitutes a conpensable wrong." *Dennison v. City of Los Angeles*, 658 F.2d 694, 695 (9th Cir. 1981). The *Bernardi* court specifically upheld the validity of the Decree and ordered the Forest Service to comply with its terms upon penalty of contempt. The Secretary argues that because the Forest Service was legally obligated and had no choice but to comply with the terms of the Decree, plaintiffs' claims must be dismissed under the doctrine enunciated by the Supreme Court in *GTE Sylvania v. Consumers Union*, 445 U.S. 375 (1980).

In *GTE Sylvania*, nonprofit consumer groups brought action under the Freedom of Information Act to obtain from the Consumer Products Safety Commission reports which television manufacturers had submitted on television-related

accidents. The Consumer Products Safety Commission was barred by an order issued by another federal court from releasing the requested materials. In the contexts of that case, the Supreme Court suggested that the Secretary's compliance with a court order would be a complete defense to the action brought under the Freedom of Information Act. Specifically, the Supreme Court held that the "persons subject to an injunctive order issued by a Court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." 445 U.S. at 386. The court went on to emphasize that "[t]o construe lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as `improperly' withholding documents under the [FOIA] would do violence to the common understanding of the term `improperly' and would extend the Act well beyond the intent of Congress." Id. at 387.

That a party must obey the dictates of a court exercising proper jurisdiction cannot be denied. The Secretary stresses that plaintiffs' characterization of the implementation and operation of the Decree as `unlawful' under Title VII would place the Forest Service in the impossible position of having to disobey a federal court deliberately. Plaintiffs, however, argue that collateral attacks on the implementation of consent decrees by individuals not parties or privies to the participants in the decree are permissible under established authority. Plaintiffs cite *Martin* v. Wilks, 490 U.S. 755 (1989) as support for their contention that nonparties to a consent decree may launch a collateral attack on the decree.

In *Martin v. Wilks*, a consent decree was entered into between the original plaintiffs and the defendant in an employment discrimination complaint brought by African-Americans challenging the hiring practices for the city of Birmingham, Alabama Fire Department. White firefighters

later filed independent claims of wrongful discrimination, alleging harm from the implementation of the decree. the *Wilks* court was faced with the issue of whether the claims of the white firefighters constituted an"impermissible collateral attack" on the previously entered consent decree. In affirming the right of the white firefighters to file suit, the Supreme Court held that". . . a decree among parties to a lawsuit resolves issues as among them, but does not conclude the rights of strangers to those proceedings." Id. at 762.

The Secretary correctly notes that *Martin v. Wilks* has been expressly overruled by § 108 of the Civil Rights Act of 1991. See 42 U.S.C.A. § 2000e-2(n) (West Supp.1992).[2] Plaintiffs argue, however, that tension exists between *GTE* and *Martin v. Wilks*. The court disagrees. Any tension between *GTE Sylvania* and *Martin v. Wilks* was essentially eliminated by the passage of §108. While defendant does not expressly reply on §108 in support of the current motion, the very existence of the legislative pronouncement of the subject precludes plaintiffs' reliance on *Martin v. Wilks*.[3]

B. Vogel

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[2] The Secretary's motion to dismiss does not seek dismissal on the basis of section 108 at this time, nor does the court express any opinion as to that potential basis for dismissal.

[3] This court disagrees with the D.C. Circuit court's view that despite legislative enactment of §108, *Martin v. Wilks*, "stands as an affirmation of the general principal that a judgment rendered by a federal court binds not a non-party." *Frederick County Fruit Growers v. Martin*, 968 F.2d 1265, 1270 (D.C. Cir. 1992). Clearly, §108 is a legislative attempt to bring finality to consent decree judgments.

Plaintiffs also seek to challenge the consent decree by alleging that not all actions of the defendant that are complained of by plaintiffs were required to be taken under the *Bernardi* decree. Such allegations are subject to dismissal for two reasons. First, plaintiffs have failed to identify any actions taken by defendant which go beyond the scope of the *Bernardi* consent decree. Second, because plaintiffs were not parties to the Decree, they lack standing to argue that the Forest Service's actions went beyond the scope of the decree. *See, Vogel v. The City of Cincinnati,* 959 F.2d 594, 598 (6th Cir.) *cert. denied,* 113 S.Ct. 86 (1992). Accordingly, plaintiffs' claims that defendant's actions went beyond the scope of the consent decree are DISMISSED.

C. Plaintiffs' Second Cause of Action

Plaintiffs' second cause of action purports to raise a claim for employment discrimination directly under the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The Supreme Court has held, however, that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment. *Brown v. GSA,* 425 U.S. 820, 835 (1975). "The Title VII remedy declared exclusive for federal employees in *Brown v. GSA.* precludes actions against federal officials for alleged constitutional violations as well as action under other federal legislation." *Kizes v. Webster,* 707 F.2d 524, 542 (D.C. Cir. 1983, *cert. denied,* 464 U.S. 1042 (1984). Because Title VII is the exclusive remedy for claims involving employment discrimination against the Federal Government, plaintiffs' Second cause of Action brought directly under the Fifth Amendment to the Constitution against the Forest Service is DISMISSED.

ORDER

For the foregoing reason the court orders as follows:

1. Defendant's motion to dismiss plaintiffs' complaint is GRANTED. Plaintiffs' complaint is hereby DISMISSED in its entirety.

2. JUDGMENT IS HEREBY ENTERED IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF. The clerk of the court is directed to close the file in this matter.

IT IS SO ORDERED.

Dated: December 14, 1993

/s/ Barbara A. Caulfield
Barbara A. Caulfield
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT JAN 16 1996

CATHY A. CATTERSON
U.S. COURT OF APPEALS

MARK G. LEVITOFF, et al.,	)	No. 94-15169
Plaintiff-Appellants,	)	D.C. No. CV-92-4108-BAC
v.	)	
MIKE ESPY, Secretary, United States Department of Agriculture,	)	**MEMORANDUM**
Defendant-Appellee.	)	

Appeal from the United States District Court
For the Northern District of California
Barbara A. Caulfield, District Judge, Presiding

Argued and Submitted May 11, 1995
San Francisco, California

Before: GOODWIN, POOLE, AND KLEINFELD, Circuit Judges.

Appellants Mark Levitoff, et al., a class of male employees of the United States Forest Service, appeal the district court's dismissal of their Title VII action against the Secretary of the Department of Agriculture. The original suit, brought under 42 U.S.C. § 2000 (e), alleged that a consent decree which aided female Forest Service employees in another action, *Bernardi v. Yeutter,* Civ. Action No. 73-

1110 SC (N.D. Cal.), resulted in discrimination against male employees. We affirm in part and reverse in part.

This case is inextricably linked to *Bernardi*. That case commenced in 1973, when the original plaintiff, a Female Forest Service employee brought a Title VII civil rights action against the Department of Agriculture for the discriminatory denial of promotion opportunities. The parties agreed to a consent decree in 1979. The district court approved the consent decree in 1981 after two fairness hearings and the expiration of an appeals period. In 1988, the district court extended the terms of the consent decree for three years, until 1991.

In 1990, only one year before the consent decree was scheduled to expire, the current plaintiffs filed a motion seeking to intervene in *Bernardi* on behalf of a class of male employees. They also requested a suspension of the decree. The district court denied both the request for injunctive relief and the request to intervene. We upheld that decision in *Bernardi v. Yeutter,* 945 F. 2d 408 (9th Cir. 1991). In 1993, the district court issued an order approving a final settlement of the *Bernardi* action and suspending the consent decree.

The plaintiffs filed this suit in 1992, after the *Bernardi* litigation concluded. The district court dismissed the complaint. The factual allegations underlying this action are virtually identical to the ones in the unsuccessful *Bernardi* action. The male class appeals, in what is essentially another attack on a formerly legitimate, and now suspended, consent decree.

We review a dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b) (6) de novo. *Everest and Jennings v. American Motorists Ins. Co.,* 23 F. 3d 226, 228 (9th Cir. 1994). Review is limited to the contents of the complaint. *Buckey v. Los Angeles,* 968 F. 2d 791, 794 (9th

Cir.), *cert. denied,* 113 S. Ct. 599 (1992).

The basis of Appellants' argument is that their claims are not barred by the Supreme Court's decision in *GTE Sylvania v. Consumers Union,* 445 U.S. 375, 386 (1980) ("persons subject to an injunctive order issued by a Court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order"). Appellants are dead wrong. *GTE* is directly applicable, and forecloses their claims.

The Secretary's compliance with a court order is a complete defense to actions such as these, because the *Bernardi* court specifically upheld the validity of the decree and ordered the Secretary to comply with its terms upon penalty of contempt. As the district court correctly held, the Secretary was legally obligated and had no choice but to comply with the terms of the decree. Appellants' complaint fails to allege any facts that fall outside the actions mandated by the *Bernardi* consent decree. Thus, the court did not err when it dismissed Appellants' claims under the *GTE* standard.

Appellants' argument that they were not given a reasonable opportunity to object to the *Bernardi* consent decree is absurd. Appellants not only missed two fairness hearings, but also failed timely to intervene in numerous hearings and proceedings in litigation that had been pending for 17 years before they chose to enter the fray.[1]

---

[1] Appellants' request to take judicial notice of two documents from the Secretary's records, pursuant to Fed. R. Evid. 201 (b) (2), is denied. There is no basis for admitting the two administrative Equal Employment Opportunity Commission decisions, because the Appellants cannot litigate the precise issue that is foreclosed. Further, both decisions only address specific individual instances of discrimination.

(continued...)

III.

We cannot agree, however, with the conclusion of the district court that Appellants lack standing to argue that the Forest Service's actions went beyond the scope of what was required by the decree. Standing is a question of law reviewed de novo. *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 61 (9th Cir. 1994).

We have no quarrel with the law relied upon by the district court that restricts standing to enforce a consent decree to parties and intended third-part beneficiaries. See *Hook v. State of Arizona Dep't of Corrections*, 972 F.2d 1012, 1015 (9th Cir. 1992) (A consent decree "`is not enforceable directly or in collateral proceedings by those who are not parties to it.'") (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975). But see *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir.) *cert. denied*, 113 S. Ct. 86 (1992) (holding that a non-party to a consent decree was barred from collaterally seeking "to enforce it according to his own interpretation of it").

We note that the Appellants here certainly are not attempting "to enforce" the terms of the consent decree as that phrase was used by the third-party beneficiaries in *Hook*. See 972 F.2d at 1014-15. Rather, they wish to prove that the Secretary took actions not required by the *Bernardi* consent decree, and that those actions violated Appellants' rights. For this claim, Appellants' have standing. If they did not, the Secretary could take any action he wished by simply alleging that the consent decree mandated it. Parties must have standing to prove that particular conduct lies beyond the

---

[1](...continued)
Neither speak to nor demonstrate any routine practice or commonplace pattern.

scope of an order.[2]

However, as discussed, we agree with the district court that none of the facts pled by Appellants here indicate that the government did anything except follow the consent decree. As such, the district court's dismissal of the Appellants' complaint under the *GTE* standard is **AFFIRMED.**

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[2] We need not address the thorny issue of retroactivity of Section 108 of the Civil Rights Act of 1991, see 42 U.S.C. § 2000e-2 (n) (1) (A), because the government did not rely on this provision of Title VII in support of its contention that Appellants lack standing to bring the instant action. However, our conclusion is not in conflict with §108 because that subsection only bars challenges to an "employment practice that implements and is within the scope of a litigated or consent judgment. . . ." Id. Thus, by its own terms, § 108 appears to contemplate actions that allege discriminatory employment practices that go beyond the scope of a previously litigated consent decree.

FILED
JAN 16 1996
CATHY A. CATTERSON
U.S. COURT OF APPEALS

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent. We should reverse. Men sued as a class, claiming that the Forest Service discriminates against them in hiring and promotions based on their sex. They seek an injunction requiring the Forest Service to stop discriminating, and to hire, promote and train class members who were harmed by the sex discrimination. The Forest Service says it cannot give plaintiffs relief because of the *Bernardi* decree. Yet he decree has been suspended and no longer imposes any restraints on the Forest Service. Plaintiffs are also suing for remedial measures for past discrimination against men not required by the decree.

The majority upholds the district court's rule 12 (b) (6) dismissal of plaintiffs' claims, stating that plaintiffs' claims were foreclosed under *GTE Sylvania v. Consumer's Union*, 445 U.S. 375 (1980). The district judge said that "plaintiffs' have failed to identify any actions taken by defendant which go beyond the scope of the *Bernardi* consent decree." The majority and the district court err in dismissing plaintiffs' claims for two reasons.

First, compliance with the decree was an affirmative defense, not an element of plaintiffs' sex discrimination claim. A complaint need not state why an anticipated affirmative defense is invalid. The district court might reasonably require such a statement as a matter of litigation management under Rule 16, but that does not justify dismissing the complaint for failure to state a claim upon which relief can be granted. The statement the district court wanted was not an element of a claim.

Second, the affirmative defense, if valid, is limited to past discrimination. Even if the Forest Service in the past

had no choice but to discriminate against men because of the *Bernardi* decree, it is now free of that restraint, and could treat men equally in the future. The *Bernardi* decree has been suspended and no longer restrains the Forest Service. Therefore, plaintiffs' claim for injunctive relief based on current Forest Service discriminatory practices should not be dismissed under Rule 12 (b) (6).

I am not sure that the *GTE Sylvania* doctrine should protect an employer from liability for sex discrimination pursuant to a consent decree. The Forest Service perhaps should be liable to men if it colluded with women to obtain a judicial decree requiring it to discriminate against men based on their sex. But we need not reach that question to reverse.

We of course should not decide, on this appeal, whether the Forest Service discriminated and continues to discriminate against men based on their sex. But the men so claiming should be allowed to try to prove that this is so. Their case has erroneously been dismissed without giving them a fair chance to prove it.

It is a bit much to attack the men bringing this lawsuit for failing to do anything in 1973. Probably quite a few of the men who would like Forest Service jobs without being at an arbitrary disadvantage based on their sex were not born in 1973. Quite a few of the men whose promotions might have been barred by their sex are probably in their twenties and thirties, and were children in 1973. A 35 year old Forest Service employee who has been passed over for promotion based on his sex would have been 13 in 1973. No one invited plaintiffs' or anyone representing men's interests to be heard in 1973. A consent decree is inherently collusive, and there was no representation of the class of persons to be discriminated against, men, in *Bernardi*. *Bernardi* is over and final, so it can not now be challenged,

but that does not mean that any challenge relating to sex discrimination against men is barred by that old and now suspended decree.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT APR 16 1996

CATHY A. CATTERSON
U.S. COURT OF APPEALS

MARK G. LEVITOFF, et al.,	)	No. 94-15169
Plaintiff-Appellants,	)	D.C. No. CV-92-4108-BAC
v.	)	
MIKE ESPY, Secretary, United States Department of Agriculture,	)	ORDER
Defendant-Appellee.	)	

Before: GOODWIN, POOLE, AND KLEINFELD, Circuit Judges.

Judges Goodwin and Poole voted to deny the petition for rehearing, and recommended rejecting the suggestion for rehearing en banc. Judge Kleinfeld has voted to grant the petition for rehearing, and would accept the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. No active judge of the court requested a vote on whether to rehear the matter en banc. Thus, the petition for rehearing is hereby **DENIED**, and the suggestion for rehearing en banc is also hereby **REJECTED**.

Gene BERNARDI, individually and on behalf of the class she represents, Plaintiffs-Appellees,
Mark G. Levitoff, Intervenor-Appellant,

v.

Clayton YEUTTER, Secretary of Agriculture, Defendant-Appellee.

No.90-15550.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 12, 1991.

Decided Sept. 25, 1991.

On Appeal From the United States District Court for the Northern District of California, No. CV-73-1110-SC; Samuel Conti, District Judge, Presiding.

N.D. Cal.

AFFIRMED

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

(THE FOLLOWING UNREPORTED DECISION IS REPRODUCED FOR THE CONVENIENCE OF RESEARCHERS. ADD THE NOTATION: (text in WEST-LAW) TO ANY CITATION IN THIS DECISION.)

Before SCHROEDER, BEESER and NOONAN, Circuit Judges.

MEMORANDUM [FN*]

Mark Levitoff appeals the district court's denial of his motion to intervene, on behalf of himself and other similarly situated males, [FN1] in a civil rights class action between female employees of the Forest Service and the Secretary of Agriculture. We affirm.

I

The female class action was originally filed in June 1973. Following six years of litigation, the female class and the Secretary agreed to enter into a consent decree that was to last five years and was based on the goal of eliminating the underrepresentation of women within a specified area of the Forest Service. In July 1986, the female class moved for an order holding the Secretary in contempt of court for failure to comply with the consent decree. The female class succeeded in its request, and the consent decree was extended for a period of three years by order of the district court.

On February 28, 1990, the male class lodged documents with the district court in an attempt to intervene in the female class action and obtain injunctive relief. On that same day, without a hearing, a district judge not assigned to the female class action signed the male class' proposed Temporary Restraining Order. Two days later, the district judge assigned to the female class action held a hearing on the motion to intervene and the requests for injunctive relief. At the hearing the district court denied the motion to intervene, dissolved the Temporary Restraining Order and denied any further injunctive relief. The male class timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1291

II

We apply a four-part test in determining whether a motion to intervene as of right meets the requirements of Fed.R.Civ.P2-4(a)(2). The district court must determine whether:

(1) the motion is timely; (2) the movant asserts an interest relating to the property or transaction that is the subject of the action; (3) without intervention the disposition of the action may as a practical matter impair or impede the movants ability to protect that interest; and (4) that interest

is inadequately represented by the other parties.

Petrol Stops Northwest v. Continental Oil Co. 647 F.2d 1005, 1009 (9th Cir.), cert. denied, 454 U.S. 1098 (1981).

The district court held that the male class' motion to intervene was untimely. We review this decision for an abuse of discretion. County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir. 1986), cert. denied, 480 U.S. 946 (1987). The male class attempted to intervene in litigation that had been pending for seventeen years. A consent decree had already been approved by the court. The Order entering the decree was filed approximately nine years before the male class moved to intervene. During this nine year period, the district court had evaluated the Secretary';s compliance with the consent decree and had ruled that the Secretary had failed to fully implement the decree. Based on this finding, the district court extended the decree for a three year period.

In light of the time and resources invested by the court and the parties in establishing the consent decree and ensuring its implementation, it was not an abuse of discretion for the court to deny the male class' motion to intervene. See id. at 538; Petrol Stops Northwest, 647 F.2d 1009. 1010; Alaniz v. Tillie Lewis Foods, 572 F.2d 657, 659 (9th Cir.), cert. denied, 439 U.S. 837 (1978). Moreover, the male class has failed to show that it lacked knowledge of the female class action or the consent decree during the time it delayed filing its motion to intervene. Thus, it has failed to convincingly explain its reasons for delay. See id.

The male class' reliance on Martin v. Wilks, 490 U.S. 755 (1989) is misplaced. Martin is involved in an attempt by a group of white firefighters to collaterally attack a consent decree when they had not attempted to timely intervene in the proceeding that established the consent decree. See id. at 762. The Martin Court was faced with the issue of

whether collateral attack of a consent decree was appropriate. Moreover in Martin, the Eleventh Circuit affirmed the district court's denial of a separate group of white firefighters' motion to intervene in the proceeding that had established the consent decree. The Eleventh Circuit held that the denial of the motion to intervene was not an abuse of discretion because the firefighters could have instituted a collateral attack on the consent decree. See id. at 760. The male class in this case, just as the firefighters in Martin, can attempt to collaterally attack the consent decree.

Because we conclude that the male class' motion was untimely, we do not have to determine whether the male class meets the remaining elements of the circuit's test or whether the district court erred in denying the male class' requested injunctive relief.

Finally, the female class has requested attorneys' fees pursuant to 42 U.S.C. § 2000e-5(K). We note that §2000e-5(K) "is couched in permissive language." Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1008 n. 5 (9th Cir. 1972). We decline to award any attorneys' fees or costs on this appeal.

Accordingly, the district court's denial of the male class' motion to intervene is AFFIRMED, and the female class' request for attorneys' fees is DENIED.

> FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir.R.36-3.
>
> FN1. For the purposes of convenience, the intervenors will be referred to as the "male class."

C.A.9 (Cal.) 1991.
Bernardi v. Yeutter

DECLARATION OF COUNSEL

I, Louis Demas, declare as follows:

The documents found at ER 20 and ER 27 are public records maintained by the Office of the Secretary, U. S. Department of Agriculture as administrative decisions on employment discrimination claims brought under Title VII. These decisions are *Barry W. Callenberger v. Secretary of the Agriculture*, decision issued on August 20, 1993, found at ER 20, and *Hugh M. Shaver and Michael C. Leveroos v. Secretary of Agriculture*, Consolidated Complaint No. 910607, September 17, 1993, found at ER 27. A true copy of the *Shaver* decision was provided to me in my capacity as the attorney for the Complainants therein. A true copy of the *Callenberger* decision was provided to me by the Complainant therein.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on March 10, 1994 at Sacramento, California.

\s\ Louis Demas
LOUIS DEMAS

U.S. DEPARTMENT OF AGRICULTURE
EEO COMPLAINT FINAL DECISION

Complainant: Barry W. Callenberger

Agency: Forest Service

Issues: Promotion

Basis: Race, Sex

DECISION

We find discrimination based on sex was an impermissible factor in denying the complainant a promotion. The following relief for the complainant and corrective actions are required:

(1) The complainant will be promoted retroactively as of the date of the selectee's promotion to GS-462-11. All personnel documents will be revised to reflect this action. The Agency will calculate and pay to the complainant back pay in accordance with 5 CFR 550.805;

(2) The complainant will be placed in the first GS-462-11 vacancy, the location and duties of which are acceptable to him;

(3) No attorney's fees are awarded, because the complainant has never notified the Department of legal representation;

(4) No compensatory damages are payable, as the issues accepted in this complaint predate the passage of the Civil Rights Act of 1991;

(5) This case file has been sent to the Director, Employee Relations Division (ERD), Office of Personnel, for a determination of appropriate disciplinary or other administrative action. The Agency must review the Circumstances involved and recommend to the Director, ERD, corrective action, including discipline, revocation or limitation of authority, and/or training. The recommendation must be submitted within 30 days of this decision with a copy to the Disputes Resolution Staff.

(6) For any responsible official still employed by the Department of Agriculture, the Agency will insure the consideration of this decision under that person's Equal Opportunity and Civil Rights performance element.

(7) A report of the corrective actions taken will be furnished to the Director, Disputes Resolution Staff, Office of Advocacy and Enterprise, Room 324-W, Washington, D. C. 20250, within 60 days of the receipt of this decision.

STATEMENT OF THE CASE

The complainant (white, male) is an Assistant Fire Management Officer (Fuels), GS-462-9, assigned to the Placerville Ranger District, El Dorado National Forest, Region 5. In March 1991, the complainant applied for promotion to District Five Management Officer, GS-460/462-11, on the Mi-Wok Ranger District, Stanislaus National Forest, Region 5. This was one of 15 similar positions that were advertised and filled in Region 5.

For the 15 positions in question, there were 115

qualified applicants, 105 men and 10 women. For the Mi-Wok Ranger District, 34 candidates were considered, 32 men and 2 women. Selections were made at a meeting held at the Regional Office. The Acting District Ranger (Responding Official or RO) was delegated the authority by the Forest Service to make the selection. RO's first choice became the selectee (white, female). The complainant was RO's second choice. He was not considered for any of the other positions, as he had restricted his application to the Mi-Wok Ranger District.

ANALYSIS AND FINDINGS

In administrative proceedings involving allegations of discrimination, the Department assumes the burden of establishing a sufficient factual record to prove or disprove the charges of the complaint. The record is then reviewed in light of evidentiary standards and analytical frameworks established in various courts of law.

In determining whether discrimination has occurred, the record is first examined for the existence of a *prima facie* case of discrimination. If a *prima facie* case is established, it will stand unless some legitimate, nondiscriminatory reason, sufficiently detailed to permit rebuttal, is articulated. The record is then examined to determine if the articulated reason is supported by credible evidence, or alternatively, is a pretext used to mask prohibited discriminatory motives.

A *prima facie* case of discrimination may be shown in cases such as this by the following:

(1) The complainant is a member of a protected group (for discrimination) or participated in protected EEO activity of which the responsible officials had knowledge (for reprisal);

(2) Agency officials took some action, or decided not to take some action, that adversely affected the complainant, and;

(3) Facts exist that will permit an inference of causation to be drawn between the protected status and the decision at issue.

The following establish a *prima facie* case of discrimination based on sex:

(1) The complainant is a member of a protected class by virtue of his sex (male);

(2) The complainant was highly qualified for the position, but was not selected;

(3) For the 15 positions filled in this case, the ratio of female selectees to female applicants was 60% (6 out of 10); the ratio of male selectees to male applicants was 8.9% (9 out of 105). The difference is significant.

The following reasons were articulated by RO as the reasons for making the selection that he did:

* The position required someone who could provide strong leadership, due to problems created by the previous incumbent.

* The complainant was clearly the most qualified applicant in terms of his range of skills and experience.

* Nevertheless, the selectee was well qualified for the position, and was an acceptable choice. In the absence of the Consent Decree (CD)

(*Bernardi v. Secretary of Agriculture*, the purpose of which was to increase the employment and opportunities of women.), the complainant would have been chosen, but because it was in effect, he was not.

The articulated reasons are found to be discriminatory based on sex, and reflect a decision in favor of women not specifically provided under the CD. No provision in the CD provides for the selection of anyone other than the best applicant based on merit. In fact, the CD Handbook provides that the "selection criteria are those knowledges, skills, abilities, and characteristics which are unique to the specific job, and will help identify the individual with the best (underlying supplied) potential for success."

One of the selection criteria mandated by the CD was the candidate's ability to contribute to the diversity of the workforce. Guidance on the use of this factor provided that it was either to be used as one of several factors, or as a tie-breaker in the event candidates were equally qualified. In this case, RO went beyond the intent and guidance of the CD. No tie-breaker was appropriate here because RO had identified the complainant as clearly the superior candidate. It also cannot be concluded that it was merely used as one of several factors in RO's consideration, rather it was the main factor. If as RO asserts, the complainant was "clearly" the better candidate based on his range of skills and experience, then RO had to have placed more emphasis on the selectee's sex than provided for under the CD. This conclusion is buttressed in large part by the large discrepancy between selection ratios for males and females.

This conclusion is reached solely on the RO's statements, and does not imply that the selectee was not in fact equally or better qualified than the complainant, given proper consideration of her potential to perform.

APPEAL RIGHTS

The complainant has the right to appeal this final decision to the Equal Employment Opportunity Commission (EEOC) by completing the enclosed EEOC Form 573 and sending it to the Director, Office of Federal Operations, EEOC, P.O. Box 19848, Washington, D.C. 20036. The appeal must be filed within 30 days of receipt of this decision. A copy of EEOC Form 573 is attached to the final decision (29 CFR 1614.402). Any statement or brief in support of the appeal must be submitted to the Director, Office of Federal Operations, within 30 days of filing the appeal.

A copy of any appeal or brief filed with EEOC or the court must be sent to the Director, Disputes Resolutions Staff, Office of Advocacy and Enterprise, U.S. Department of Agriculture, Room 324-West, Administration Building, 14th and Independence Avenue, S.W., Washington, D.C. 20250. The complainant must certify to the EEOC that this office has been sent a copy of any material or brief so submitted.

If the complainant does not file an appeal to the EEOC within the time limit, any subsequent appeal will be untimely and will be dismissed by the Commission.

Within 90 days of receipt of the final decision, the complainant may file a civil action in a Federal District Court, if no appeal to the EEOC has been filed. Any civil action that the complainant files must name Mike Espy, Secretary of Agriculture, as the defendant. If the complainant appeals to the EEOC, the complainant will be able to file a civil action within 90 days of the Commission's final decision, or if there has been no final decision by the Commission within 180 days from the date of filing a timely appeal with the Commission.

/s/ Duane Howard
for WARDELL C. TOWNSEND, JR.
Assistant Secretary
for Administration

8/20/93
DATE

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(916) 399-8063

Attorney for Plaintiffs
(See signature page)

ORIGINAL
FILED
SEP 27 1993
RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK G. LEVITOFF, ALEX B. COLE, KERMIT JOHANNSON, BAXTER VIRTUE, THOMAS MARKS, JOHN D. CROSSLIN, THOMAS CAVES, and all those similarly situated,	CIV NO. C92-4108BC
Plaintiff,	PLAINTIFFS' SUBMISSION OF ADDITIONAL CITATION FOR PENDING MOTION
v.	
MIKE ESPY, Secretary, United States of Agriculture, Agriculture,	
Defendant.	

Plaintiffs, in this action, by and through their undersigned attorney, submit a recently issued administrative decision of the Secretary of Agriculture relevant to the defen-

dant Secretary's pending motion to dismiss plaintiffs' complaint.

The decision is a U.S. Department of Agriculture EEO Complaint Final decision in Hugh M. Shaver and Michael C. Leveroos v. Secretary of Agriculture, Consolidated Complaint No. 910607, September 17, 1993. A copy of the decision is attached hereto.

This decision relates to defendant Secretary's previous contention that plaintiffs lack standing to prosecute claims of employment discrimination for actions taken by the Secretary that were not required by the Bernardi Litigation consent decree. The defendant Secretary had relied on Vogel v. The City of Cincinnati, 959 F.2d 594 (6th Cir. 1992), cert. denied, 113 S.Ct 86 (1992).

Plaintiffs allege in paragraph 2 of their complaint that "... not all actions of the defendant that are complained of by plaintiffs were required to be taken under the ...." Bernardi Litigation Consent Decree. As stated in plaintiff's opposition to the defendant Secretary's motion to dismiss, the allegation was included so that plaintiffs could prosecute their claims of employment discrimination should they otherwise be denied an opportunity to collaterally attack the consent decree.

The subject decision is relevant to the pending motion to dismiss in that it sets out, at least in part, the Secretary's own interpretation of the limits of the Bernardi consent decree. Accordingly, the decision is relevant to the question of whether plaintiffs may prosecute claims of employment discrimination for decisions admitted by the Secretary to not have been required by court order and which may be violative of the Title VII of the Civil Rights Act of 1964, as amended.

DATED: September 25, 1993

/S/ Louis Demas

LOUIS DEMAS, Attorney for Plaintiffs Mark G. Levitoff, Alex B. Cole, Kermit Johannson, Baxter Virtue, Thomas Marks, John D. Crosslin, Thomas Caves, and all those similarly situated

DEPARTMENT OF AGRICULTURE
OFFICE OF ASSISTANT SECRETARY FOR ADMINISTRATION
WASHINGTON, D.C. 20250-0100

SEP 17 1993

Louis M. Demas, Esq.
925 Secret River Drive
Suite J
Sacramento, California 95831

Dear Mr. Demas:

Enclosed is the final decision of the Department of Agriculture on the consolidated complaints (910607) of discrimination filed by your clients, Michael C. Leveroos, and Hugh M. Shaver. Please refer to the decision for their rights of further review.

Sincerely,

/s/ Wardell C.Townsend Jr.
Wardell C. Townsend, Jr.
Assistant Secretary
for Administration

Enclosure

U.S. DEPARTMENT OF AGRICULTURE
EEO COMPLAINT FINAL DECISION

Complainants: Hugh M. Shaver and Michael C. Leveroos

Agency: Forest Service

Issues: Promotion

Basis: Sex

DECISION

The complainants requested a hearing before an Administrative Judge (AJ) appointed by the Equal Employment Opportunity Commission. A hearing was held on April 22 and 23, with nine witnesses, 26 exhibits, and summary arguments submitted in writing. The AJ's recommended findings of fact and conclusion of law were received by the Department on August 3, 1993.

The AJ recommended a finding of no discrimination with no relief or attorney's fees. We hereby reject the AJ's recommendation for the reasons cited below, and enter a finding of discrimination based on sex, when the complainants were not selected for promotion. The following relief for the complainants and corrective actions are required:

(1) The Agency will retroactively promote complainant Michael C. Leveroos to GS-462-7, as of the first pay period following notification of the selection. The Agency will make appropriate corrections to the complainants personnel records, and provide back pay and benefits calculated under 5 CFR 550.805;

(2) The Agency will place complainant Leveroos in the first vacant funded GS-462-7 position acceptable to the complainant, with transfer of station costs, if appropriate;

(3) No injunctive relief is ordered, because the discriminatory practice was specific to the situation, and no longer relevant given the expiration of the Consent Decree (CD) (*Bernardi v. Secretary of Agriculture)*;

(4) Both complainants are entitled to reasonable attorney's fees as prevailing parties. By copy of this decision, the complainants attorney is advised of his responsibility to submit a verified statement and affidavit within 30 days of receipt of this decision, as provided in 29 CFR 1614.501(e). The statement and affidavit should be submitted to the Agency's representative;

(5) No compensatory damages are payable, as the issues accepted in this complaint predate the passage of the Civil Rights Act of 1991;

(6) This case file has been sent to the Director, Employee Relations Division (ERD), Office of Personnel, for a determination of appropriate disciplinary or other administrative action. The Agency must review the Circumstances involved and recommend to the Director, ERD, corrective action, including discipline, revocation or limitation of authority, and/or training. The recommendation must be submitted within 30 days of this decision with a copy to the Disputes Resolution Staff.

(7) For any responsible official still employed by the Department of Agriculture, the Agency will insure the consideration of this decision under that person's Equal Opportunity and Civil Rights performance element.

(8) A report of the corrective actions taken will be furnished to the Director, Disputes Resolution Staff, Office of Advocacy and Enterprise, Room 324-W, Washington, D. C. 20250, within 60 days of the receipt of this decision.

STATEMENT OF THE CASE

The complainant's are Forestry Technicians, GS-462-6, assigned to Region 5 of the Agency. Both applied for promotion to the position of Supervisory Forestry Technician, GS-462-7, in response to vacancy announcement R516-008-91G. Both were found to be among the best qualified candidates for promotion to the GS-7 level by an evaluation panel, and were referred for consideration. All candidates, (seven competitive candidates and two non-competitive candidates) referred at the GS-7 level were males.

The vacancy was also announced at the GS-6 level. No panel ranked the GS-6 level candidates, as there were insufficient candidates to require competition. All qualified GS-6 level candidates were referred for consideration. This included five males and one female.

The applications of the fifteen applicants referred for consideration were reviewed by a selection advisory panel (SAP) (two males and one female), who listed each candidate's strengths and weaknesses for each of the evaluation criteria. Although ranking the candidates was not among the SAP's charges, they provided a recommendation

to the Acting District Ranger (ADR). The SAP's unanimous recommendation was that Candidate A (CA) was the strongest candidate. The also recommended a second candidate with CA at the top, and with 3-6 in a second group.

ADR recommended to the Deputy Forest Supervisor (Responding Official or RO) that CA be selected. He also provided reasons why the female candidate, whose selection he was not recommending, should not be selected.

RO reviewed the female candidate's application, determined that the SAP and ADR had not given her adequate credit in their review process, and concluded that she possessed strengths in all of the evaluation criteria. RO judged the female applicant to be equal in qualifications to CA, and selected her, based on provisions in the CD.

ANALYSIS AND FINDINGS

In administrative proceedings involving allegations of discrimination, the Department assumes the burden of establishing a sufficient factual record to prove or disprove the charges of the complaint. The record is then reviewed in light of evidentiary standards and analytical frameworks established in various courts of law.

In determining whether discrimination has occurred, the record is first examined for the existence of a *prima facie* case of discrimination. If a *prima facie* case is established, it will stand unless some legitimate, nondiscriminatory reason, sufficiently detailed to permit rebuttal, is articulated. The record is then examined to determine if the articulated reason is supported by credible evidence, or alternatively, is a pretext used to mask prohibited discriminatory motives.

A *prima facie* case of discrimination may be shown

in cases such as this by the following:

(1) The complainant is a member of a protected group (for discrimination) or participated in protected EEO activity of which the responsible officials had knowledge (for reprisal);

(2) Agency officials took some action, or decided not to take some action, that adversely affected the complainant, and;

(3) Facts exist that will permit an inference of causation to be drawn between the protected status and the decision at issue.

The following establish a *prima facie* case of discrimination based on sex:

(1) The complainants are members of a protected class by virtue of their sex (male);

(2) The complainants were among the best qualified candidates for promotion, but were not selected;

(3) A candidate from another protected class (female) was selected. RO cited sex as a consideration in his decision.

The following reasons are articulated regarding the management decisions and actions forming the basis of the complaint:

* The CD provides for granting limited preference to females in under-represented (less than 43 per cent) series and grades.

* Preference could be granted when it was determined that the female's qualifications were equal to that of the male's qualifications.

* The selectee's qualifications were equal to CA's and therefore it was appropriate to consider the selectee's sex in breaking the tie.

The first two articulated reasons are found to be legitimate, nondiscriminatory, and supported by the evidence. The final reason articulated, although nondiscriminatory on its face, is found to have been a pretext for discrimination based on sex.

* RO's assertion that the selectee's qualifications were equal to CA's is not credible. Three members of the SAP, spending from one to two complete days reviewing the applications, concluded that CA was head and shoulders above all but one other candidate, including the selectee. ADR reached the same conclusion after 7-8 hours of review. RO reached the contrary conclusion after half an hour or so. A thorough and complete review was not possible in such a short period of time.

* RO did not review any other applications besides those of the selectee and CA. He assumed that if the selectee was equally qualified to CA, then she was equally qualified with all of other applicants. This is logically fallacious. RO claims he found that the SAP and ADR made errors in reviewing the selectee's application. It is possible they also made errors regarding other candidates' evaluations. If RO had reviewed the other

candidates' applications, he might have identified a superior candidate. It is obvious that the reason for not reviewing the other applications, including those of the complainants, was that they were not females.

* RO concluded that all candidates were equal because the selectee possessed strengths or potential strengths in all criteria. This interpretation was an abdication of responsibility. It is not supported by the CD, merit promotion principles, or logic. The CD clearly stated that the purpose of applying the evaluation criteria was to identify the best candidate. It established procedures to expand the number and type of candidates considered, and how their qualifications were to be judged. It did not remove the responsibility to make judgments.

RO's logic, if accepted, would lead to four absurd results. First, if RO's only job were to judge presence or absence of strengths, then most selections would be made through the application of the diversity criterion. How then, would ties be broken between equally qualified females? Second, if RO was not tasked with making judgments about relative strengths, then the SAP or even an objective clerk could review the applications and make most selections. Third, if only some strength or potential strength was all that mattered, the Agency would have been well advised to announce that it was not necessary to submit complete applications, as overkill was not necessary. Fourth, in some instances there might not be much difference or importance

between a very strong candidate and a slightly less strong candidate, but in some instances the difference might be significant. Using a baseball analogy, just because two batters have the same potential to hit, does not mean that the manager uses them interchangeably. One may have a higher potential (lifetime.348 batting average over 10 major league seasons) than another (.260 batting average in the minor leagues).

* RO failed to explain how the selectee was equal to CA or other candidates. Just because he concluded the SAP and ADR missed some of the selectee's strengths does not necessarily mean that CA was still not stronger.

Having found discrimination, there is a presumption that the complainants are entitled to be made whole, absent clear and convincing evidence that they are entitled to none. The Agency argued that the complainants would not be entitled to relief as the effected male was CA. CA testified that factors in his personal life changed between the date of his application for the position, and the date on which it was filled, such that he would have declined the position if it had been offered.

The AJ found that CA's testimony was internally inconsistent, thereby lacking credence. That finding is rejected. The AJ deemed it inconsistent for CA to state he would have declined the position, while still seeking positions within the same area. However, it was not inconsistent for CA to have declined this position, which would have required greater absences from home, and continued to seek positions which would have permitted him more contact with his children. The Agency's statements regarding the presence or absence of adequate child care

facilities was not responsive to CA's expressed desires.

In conclusion, there is not clear and convincing evidence that one of the complainants would not have been selected, absent the discrimination. However, the Federal courts have found that where a limited number of positions have been filled, the relief is limited to that number (See *Dougherty v. Barry*, 869 F.2d 605.) In this case, only one position was advertised and filled. Accordingly only one of the complainants is entitled to be made whole.

Based on the evidence of record, it is more likely that Mr. Leveroos, and not Mr. Shaver would have been selected. One of the SAP members recalled that Leveroos was among the top group of candidates, but could not state the same for Shaver.

APPEAL RIGHTS

The complainant has the right to appeal this final decision to the Equal Employment Opportunity Commission (EEOC) by completing the enclosed EEOC Form 573 and sending it to the Director, Office of Federal Operations, EEOC, P.O. Box 19848, Washington, D.C. 20036. The appeal must be filed within 30 days of receipt of this decision. A copy of EEOC Form 573 is attached to the final decision (29 CFR 1614.402). Any statement or brief in support of the appeal must be submitted to the Director, Office of Federal Operations, within 30 days of filing the appeal.

A copy of any appeal or brief filed with EEOC or the court must be sent to the Director, Disputes Resolutions Staff, Office of Advocacy and Enterprise, U.S. Department of Agriculture, Room 324-West, Administration Building, 14th and Independence Avenue, S.W., Washington, D.C. 20250. The complainant must certify to the EEOC that this

office has been sent a copy of any material or brief so submitted.

If the complainant does not file an appeal to the EEOC within the time limit, any subsequent appeal will be untimely and will be dismissed by the Commission.

Within 90 days of receipt of the final decision, the complainant may file a civil action in a Federal District Court, if no appeal to the EEOC has been filed. Any civil action that the complainant files must name Mike Espy, Secretary of Agriculture, as the defendant. If the complainant appeals to the EEOC, the complainant will be able to file a civil action within 90 days of the Commission's final decision, or if there has been no final decision by the Commission within 180 days from the date of filing a timely appeal with the Commission.

/s/ Wardell C. Townsend Jr. — 9/17/93

WARDELL C. TOWNSEND, JR. — DATE
Assistant Secretary
for Administration

Title 42 of the United States Code:

Sec. 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(n) Challenges to practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal

civil rights laws--

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to--

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order

was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

Sec. 2000e-5. Enforcement provisions

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government,

governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

Sec. 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

* * * * *

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

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ORIGINAL
FILED
OCT 13 1992
RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
Northern District of California

Attorney for Plaintiffs
(See signature page)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK G. LEVITOFF, ALEX B. COLE, KERMIT JOHANNSON, BAXTER VIRTUE, THOMAS MARKS, JOHN D. CROSSLIN, THOMAS CAVES, and all those situated,	) CIV NO. C92-4108BC) CLASS ACTION COMPLAINT) FOR VIOLATION OF CIVIL) RIGHTS (EMPLOYMENT) DISCRIMINATION); DEMAND) FOR TRIAL BY JURY
Plaintiff,	)
v.	)
EDWARD MADIGAN, Secretary, United States of Agriculture, Agriculture,	)
Defendant.	)

Plaintiffs, by and through their undersigned attorney, allege as follows:

JURISDICTION AND VENUE

1. This court has jurisdiction over the complaint pursuant to section 706(f)(3) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.section 2000(e)-5(f)(3), and 28 U.S.C. §§1331 and 1343. Venue is in this district pursuant to 28 U.S.C. section 1391(e).

2. Plaintiffs' claims involves a challenge to employment practices that may be asserted by defendant to have been required by a consent decree in Bernadi V. Yuetter, Civ No. C-73-1110-SC (N.D. Calif.). Plaintiffs allege that they are not barred from presenting such claims on the basis that the exceptions to subsection (n) of §703 of the Civil Rights Act of 1964 permits the prosecution of plaintiffs claims, not all actions of the defendant that are complained of by plaintiffs were required to be taken under the just-mentioned litigation, and plaintiffs complain of continuing discrimination after such litigation was terminated.

CLASS ACTION ALLEGATIONS

3. This action is brought by the Plaintiffs named in paragraph 4, infra, as a class action pursuant to Rule 23(a), F.R.Civ.P., for and on behalf of all males who applied for promotions, employment, and training within the time period allowed by law, and for and on behalf of all qualified males in the work force who, because of Defendant's practice of discrimination, would have applied for such promotions, employment, and training during that same time period had it not been for their knowledge of the discrimination practiced by Defendant within the Pacific Southwest Region of the Forest Service, United States Department of Agriculture.

a. This class is numerous that joinder of all potential individuals as plaintiffs is impracticable.

b. There are questions of law and fact common to the class, which questions predominate over any questions affect-

ing only individual class members. The claims of the named plaintiffs are typical of the claims of the class members.

c. The named plaintiffs can fairly and adequately protect the interests of the class.

d. Defendant has acted and has refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and compensatory relief with respect to all members of the class.

4. Defendant is and has been engaged in intentional employment discriminatory practices that emanate from a common plan or scheme uniformly applicable to all male applicants for positions and training, in particular.

a. Plaintiff Mark G. Levitoff is a male employee of the Pacific Southwest Region who has been discriminated in selection for a position. Plaintiff Levitoff was placed on a certificate of eligibility but was not selected because there were no qualified female applicants. Plaintiff Levitoff was denied selection when females that had been on eligibility certificates declined the position when offered. The announcement for the position was then canceled. Plaintiff Levitoff has also been the victim of retaliation in that he was not selected for a position because he had previously complained of employment discrimination.

b. Plaintiff Alex B. Cole is a male employee of the Pacific Southwest Region who was denied selection for a position by changing of position descriptions and requirements to insure selection of females and to eliminate him from selection. Plaintiff Cole was also denied selection for a position because a vacant position was not announced to be filled because qualified female applicants could be found to be apply for such position.

c. Plaintiff Kermit Johannson was a male employee of the Pacific Southwest Region who has been denied the opportunity to apply for positions because they were not announced for application and/or position announcement times were manipulated for the purpose of avoiding male applications. Such actions were taken for the purpose of selecting females.

d. Plaintiff Baxter Virtue is a male employee of the Pacific Southwest Region who was denied employment opportunities because of special selection programs that have been utilized in manner to favor females over males.

e. Plaintiff Thomas Marks is a male employee of the Pacific Southwest Region who was denied conversion from a technical series to a professional series while females were converted non-competitively for similar positions.

f. Plaintiff John D. Crosslin is a male employee of the Pacific Southwest Region who was denied educational opportunities for which females are given preferential treatment and selection.

g. Plaintiff Thomas Caves is a male employee of the Pacific Southwest Region who was required to perform additional duties of higher responsibility without commensurate pay or recognition.

5. All of the above plaintiffs have been systematically discriminated against because of their gender (male) as part of an intentional, pervasive, and integrated pattern and practice within the Pacific Southwest Region of the Forest Service.

FIRST CAUSE OF ACTION

6. Plaintiffs incorporate by reference the allegations of the preceding 5 paragraphs as if fully stated herein as

allegations for the first cause of action.

7. The Plaintiffs named in paragraph 4, supra, are males who sought and were denied promotions, employment, and training opportunities, within the Pacific Southwest Region of the Forest Service of the United States Department of Agriculture.

8. Defendant is the Secretary of the United States Department of Agriculture that has the responsibility for the Forest Service.

9. At all times relevant, Defendant was an "employer" as defined by section 701(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e(b), and thus is covered by and subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e et seq, as amended.

10. In each of the above cases Plaintiffs were qualified to perform the positions or opportunities they sought, and the Defendant refused to hire, to promote, to provide training, or to provide other employment opportunities to Plaintiffs because of their sex (male), while females were treated more favorably, all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000e-et seq.

11. The actions described in paragraphs 4, 5, 7, and 10, supra, are part of a intentionally administered pattern or practice of considering the gender of the applicant for any vacant position, and either refusing to consider male applicants, preferring female applicants or demanding from male applicants qualities, credentials, and experience not required of female applicants. This consideration of gender has been applied to all male applicants who have sought positions or training with Defendant. Because of this discrimination the members of the class were victims of discrimination on the basis of their sex (male) in violation of

Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000e-et seq.

12. Defendant has openly and notoriously utilized gender to deny male applicants opportunities to the point that many qualified male employees of Defendant and qualified males in the potential work force in the Pacific Southwest Region have not submitted applications for positions, training, and other employ

13. Plaintiffs have satisfied the prerequisites to suit imposed by section 706 of Title VII of the Civil Rights Act of 1964, 412 U.S.C. sections 2000-5, in particular:

a. Each of the named Plaintiffs filed a timely class complaint of employment discrimination with the Defendant in accordance with the administrative requirements of 29 C.F.R. §1613.603.

b. One hundred-eighty (180) days has passed from the date the class discrimination complaint was filed with the Defendant.

c. Each of the named plaintiffs, through an appeal by the lead class representative, received from the Equal Employment Opportunity Commission a "Notice of Right to Sue".

d. This action was commenced with thirty (30) days of Plaintiffs' receipt of a "Notice of Right to Sue".

14. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from Defendant's illegal practices.

SECOND CAUSE OF ACTION

15. Plaintiffs incorporate by reference the allegations

of the preceding 14 paragraphs as if fully stated herein as allegations for the second cause of action.

16. The defendants conduct of employment discrimination denies plaintiffs equal protection of law and due process of law as guaranteed by the Fifth and Fourteenth amendments to the Constitution.

DEMAND FOR TRIAL BY JURY

17. Plaintiffs hereby request and demand a trial by jury on all issues properly triable to a jury.

Wherefore, Plaintiffs pray that this court will certify the above described class and invoke the remedies provided by Civil Rights Act of 1964, 42 U.S.C. sections 2000e-et seq. In particular Plaintiffs pray that :

a. The court will certify the defined class pursuant to Rule 23, Fed.R.Civ.Proc.

b. The court will issue a permanent injunction enjoining defendant, its agents, successors, employees, attorneys and those acting in concert with them from engaging and continuing to engage in the unlawful practices set forth herein or in committing any other practice shown to violate Title VII of the Civil Rights Act of 1964.

c. The court will order the hiring, promotion or training of all persons in the class found to have been wrongfully denied supervisory positions with Defendant, with seniority and all benefits running from the date of the illegal action.

d. The court will order as unpaid compensation or back wages those amounts that were denied or withheld from all persons in the class that were wrongfully denied positions

running from the date of the illegal treatment until they are offered substantially equivalent positions by Defendant, with Defendant being ordered to pay interest on all unpaid amounts.

e. Plaintiffs be awarded unpaid compensation and recognition for performing functions and duties that have not been paid for.

f. Compensatory damages to compensate for the pain, suffering, and humiliation that Plaintiffs suffered as a result of Defendant's unlawful actions.

g. Plaintiffs be awarded their costs in this action, and that they be awarded a reasonable attorney's fee, including expert fees, as provided by sections 706(k) of Title VII of the Civil Rights Act of 1964 or as otherwise provided by law.

h. The court grant any other equitable relief deemed appropriate and proper.

DATED: October 13, 1992

/s/ Louis Demas
LOUIS DEMAS, Attorney for Plaintiffs Mark G. Levitoff, Alex B. Cole, Kermit Johannson, Baxter Virtue,Thomas Marks, John D. Crosslin, Thomas Caves, and all those similarly situated

Excerpt from H.R. Rep. No. 40(I), 102 Cong., 1st Sess. 60 (1991) *reprinted* in 1991 U.S.C.C.A.N. 549, 592-593

B. Explanation of Section 204

Wilks affirmed Congress's power to adopt a "special remedial scheme" balancing the rights of nonlitigants against the need for finality of judgments and prompt relief for discrimination. The court specifically recognized that such a scheme may foreclose successive litigation by non litigants, as has been done in the bankruptcy and probate contexts, if it is "otherwise consistent with due process." 109 S. Ct. at 2184 R.2

Section 204 of the legislation responds to the *Wilks* decision by adopting just such a remedial scheme, establishing procedures for challenging Title VII consent decrees and judgments. These procedures strike a middle ground between the overly strict rule barring collateral attacks, and the unacceptable, expensive approach taken by the Supreme Court in *Wilks*.

Excerpt from H.R. Rep. No. 40(II), 102 Cong., 1st Sess. 60 (1991) *reprinted* in 1991 U.S.C.C.A.N. 549,712.

Section 6.-Facilitating Prompt and Orderly Resolution of Challenges to Employment Practices Implementing Court Judgments

In *Martin v. Wilks, 109 S.Ct. 2180 (1989),* the Supreme Court held that nothing in Title VII or the Federal Rules of Civil Procedure barred persons who had failed to intervene in an employment discrimination suit in which a court decree was entered from bringing a later lawsuit to challenge hiring and promotion decisions made pursuant to that decree. But the Court noted that Congress has the power to create, and has created.

> special remedial schemes ... expressly foreclosing successive litigation by nonlitigants ... [which] may terminate pre-existing rights if the scheme is consistent with due process. *Id.* at 2184, n.2.

Congress has created, and the Court has upheld, similar schemes in bankruptcy and probate. See *e.g., NLRB v. Bildisco & Bildisco 465 U.S. 513 (1984)* and *Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478. (1988).*

The Committee intends to overturn *Martin v. Wilks* by creating a similar remedial scheme. This section is intended to promote the prompt and final resolution of employment discrimination cases while also ensuring that non-parties who may be adversely affected by a court decree resolving such a case have an adequate opportunity to challenge the decree.